No. 18210 and No. 18211

United States Court of Appeals
For the Ninth Circuit

No. 18210

BERNICE CLEFF, a single woman, *Appellant,*

vs.

NORTHERN PACIFIC RAILWAY CO., a foreign corporation, d/b in the State of Washington, *Appellee.*

No. 18211

ADA KNIGHT, a widow, *Appellant,*

vs.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEE

DEAN H. EASTMAN
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SOUTHERN DIVISION

BRIEF OF APPELLEE

JURISDICTION

(Transcript references: R.—Vol. 1, R.-2—Vol. 2.)

DISTRICT COURT—This action was commenced in the United States District Court for the Western District of Washington, Southern Division, by the filing of separate complaints. Appellant Cleff is a citizen of the State of Oregon, appellant Knight a citizen of the State of Washington, and the defendant Railway Company is a foreign corporation authorized to do and doing

business as a common carrier within the State of Washington and within the Western District of Washington. The jurisdiction of the District Court is based upon diversity of citizenship under 28 U.S.C., Sec. 1332, and the amount in controversy in each claim exceeds the sum of $10,000. The foregoing facts appear in the pre-trial orders entered in each case (R. 9, 16). The cases were consolidated for trial (R. 5, 6), and came on for trial on June 12, 1962. On that day, appellants rested their case in chief insofar as producing evidence regarding liability was concerned (R.-2, 95).

Appellee then moved for an order of involuntary non-suit and for entry of judgment of dismissal with prejudice in each case, based upon the fact that appellants had produced insufficient evidence to make a question of fact for the jury as to any negligence on the part of appellee proximately causing or contributing to appellants' injuries (R.-2, 96). After argument, these motions were granted (R.-2, 111), and subsequently the orders granting the motions and judgment of dismissal with prejudice were entered herein (R. 11, 28; R. 12, 29). Appellants gave timely notice of appeal (R. 13, 30), and thereafter the cases were consolidated for the purpose of appeal (R. 36).

Court of Appeals—This appeal to the United States Court of Appeals for the Ninth Circuit is from a final decision of the United States District Court for the Western District of Washington, Southern Division which District Court is in the Ninth Circuit. Under Title 28, Chapter 83, U.S.C. 1291 and 1294 (a), such decision is properly reviewable by such Court of Appeals.

COUNTER-STATEMENT OF THE CASE

Appellants state, on page 3 of their Brief, that at the time of the accident the sun was shining brightly in the eyes of westbound drivers (R. 9, 16; R.-2, 3, 31, 68, 88), which affected the vision of westbound drivers straight ahead. At the trial of this case, the drivers of the two westbound cars approaching the scene of the accident testified as follows regarding the effect of the sun on their view of the train movement in question:

Witness Willard Harold Sherwood testified on direct examination as follows:

> "Q. As you were approaching the railroad crossing at the St. Paul Mill was this [the sun] having any effect upon your ability to observe things ahead or to either side?
>
> A. There was a great deal of reflection on the surrounding buildings and windows causing visibility to be rather difficult." (R.-2, 3, 4)

The above response of witness Sherwood is not evidence that the sun affected his vision of the train movement on the crossing. On cross-examination regarding the effect of the sun on his view of the train, witness Sherwood testified as follows:

> "Q. Were these two visions, the flagman and the train one right after another practically at the same time?
>
> A. Yes. The flagman, he was walking ahead of the train. I couldn't say how far, but I am sure he was.
>
> Q. Now, how far back from the crossing were you?
>
> A. Oh, fifty to sixty feet, I would say.

Q. All right. Now, at that point was the sun interfering with your view of this train?

A. Not so much then, but just prior to that there had been a blinding blast of sun as you passed buildings.

Q. But as you sit here this morning telling us about what happened many, many months ago, your best recollection is that the sun did not interfere with your vision of the train once you saw it on the street, is that correct?

A. That is correct, once I got that close, I would say that." (R.-2, 15, 16)

The other westbound driver, Virginia Warren, in whose car appellants were riding at the time of the accident, testified as follows regarding the effect of the sun on her view:

"Q. As you crossed the Canal Street Bridge there and approached these railroad tracks, will you tell us, was there anything impeding your vision, your ability to see ahead?

A. There wasn't.

Q. Was there any atmospheric condition causing you any difficulty?

A. No.

Q. How about the sun?

A. No, the sun—I pulled my visor down over, you know, and it was real bright, but that didn't interfere." (R.-2, 31)

By way of pre-trial order, the following facts were admitted by the parties hereto:

That the accident in question occurred on December 22, 1958, at about 3:45 p.m., at a railroad grade cross-

ing of the St. Paul Mill tracks on 11th Street in the city of Tacoma, Washington; that the weather was clear and dry and the sun was shining brightly at the time; that 11th Street is a four-lane street with two lanes of traffic in each direction; that, at the time, a traffic signal consisting of a red light was in place over the crossing approximately in the middle of the street; that before the train started to enter the street, the red overhead traffic signal was manually actuated by a member of the train crew; that, after this was accomplished, a signal was given for the train to proceed; that, upon the train's commencing to move, two switchmen preceded the train into the street and by manual signals stopped both lanes of eastbound traffic on 11th Street; that the switchmen then proceeded to the center of 11th Street, at which time the leading end of the train was at or near the southerly edge of 11th Street; that, at about this time, the vehicle traveling west in the inside lane of 11th Street was brought to a stop; that, after the train crew had stopped the westbound car in the inside lane on 11th Street, the car in which appellants were riding overtook and passed the stopped car and collided with the train (R. 9, 16).

Mr. Sherwood, the driver of the westbound automobile traveling in the inside or center lane on 11th Street, that was brought to a stop by the train crew, testified as a witness on the trial of this case. Witness Sherwood approached the crossing at a speed of approximately 25 miles per hour (R.-2, 4), and saw the flagman on the crossing waving him to a stop when his automobile was probably 50 feet from the crossing (R.-2, 5). The flagman was standing about in the center of 11th Street

at the crossing at this time (R.-2, 5). Mr. Sherwood saw the flagman in plenty of time to bring his car to a stop rather easily, about 30 feet from the track which the train was upon (R.-2, 6). Mr. Sherwood then saw the flagman proceed into his lane of traffic, and saw him desperately try to attract the attention of Virginia Warren, driver of the vehicle in which appellants were riding (R.-2, 7), and further testified that the flagman was waving his arms at the Warren vehicle at the time the Warren car was 70 feet to the rear of the stopped Sherwood vehicle (R.-2, 17). Sherwood, after stopping, looked back toward the Warren vehicle, as he thought possibly they might not see the approaching train (R.-2, 7, 8), because at the time he passed their car upon his approach to the crossing, the women were visiting in the car and he thought that because of their visiting they might not be alert to the flagman or the light (R.-2, 18). At the time he looked to the rear upon bringing his car to a stop, the Warren vehicle was roughly 70 to 100 feet east of his car (R. 2, 8) and the leading end of the train was over 10 feet onto the traveled portion of 11th Street (R.-2, 14). Mr. Sherwood testified that the logs on the train were piled to a height of 25 feet from the street (R.-2, 16).

Virginia Warren, the driver of the car in which appellants were riding, also testified at the trial of this matter. Mrs. Warren testified that she first saw the train when the front of her car was 6 feet from the point of impact (R.-2, 33), at which time the leading end of the train was 10 feet from the point of impact (R.-2, 33), and at that time she applied the brakes of her vehicle and brought it to a stop foul of the track

on which the train was approaching (R.-2, 34), and the collision then occurred. Mrs. Warren testified that she was familiar with the crossing and the fact that trains used it, and that she had stopped for trains using this crossing, on previous occasions, a number of times (R.-2, 34). Mrs. Warren further testified that the logs on the train were considerably higher than her car and considerably higher than the car driven by Mr. Sherwood (R.-2, 39), and that there was nothing to obstruct her view of the train or the logs as she approached the crossing (R.-2, 39); that she first looked for approaching trains when her vehicle was 15 to 20 feet from the crossing, at which time she had passed the Sherwood vehicle (R.-2, 41). Mrs. Warren testified as follows regarding her view of the train:

> "Q. But is there anything that would have obstructed your view of this train as you approached that crossing from the time that it entered the street, the train entered the street—was there anything that would have obstructed your view had you looked in that direction?
>
> A. No, not at that point I guess there wasn't." (R.-2, 43)
>
> "Q. Mrs. Warren, let me ask you one other question; on December 22, 1958, at about 3:45 p.m. in the afternoon, did you approach that crossing as if you had been looking for a train—if you had actually looked on the crossing for a train, there is no reason why you couldn't have seen that train and brought your car to a stop, isn't that correct?
>
> A. Yes, but I relied on those—
>
> THE COURT: But your answer is yes, you say?
>
> THE WITNESS: Yes.

THE COURT: All right.

MR. ALLERDICE: That is all the questions I have." (R.-2, 51, 52)

Appellant Cleff, at the trial of the case, testified that she was riding in the back seat of the Warren vehicle (R.-2, 66); that she saw the train come out from behind a building on the south edge of 11th Street, at which point the Warren vehicle was 100 feet from the crossing (R.-2, 67); that, after seeing the train, she sat there for a few minutes and then finally called to the driver, Mrs. Warren, to call her attention to the approaching train (R.-2, 68); that the train was quite near the point of impact when she called to Mrs. Warren, and that she did not bring to Mrs. Warren's attention the presence of the approaching train sooner because she thought Mrs. Warren would stop the car (R. 2, 68, 69). The sun did not bother Mrs. Cleff insofar as her view of the train was concerned (R.-2, 81, 82). There was no obstruction to her view of the train (R.-2, 82). Mrs. Cleff had on previous occasions noticed the red signal at the crossing, but just didn't look up at it on the day in question (R.-2, 82). Appellant Cleff testified that she saw no flagman on the crossing, but explained the reason was because she was not looking in that direction. As the following testimony points out, she was watching the train:

"THE COURT: Mrs. Cleff, did you watch the train the whole time as it came, continued to approach?

THE WITNESS: I watch the train?

THE COURT: The whole time, saw it moving out there all the way across?

THE WITNESS: Well, I was just sitting there riding, and I glanced at her—

THE COURT: When you said you were watching the train — that is what I was wondering — you watched it all the way as it came from over here way on the other side of the street and all the way across?

THE WITNESS: Well, I don't just really know exactly.

THE COURT: Whether you were watching all the time, but most of the time?

THE WITNESS: I think so.

THE COURT: It was perfectly plain to see the train if you looked for it?

THE WITNESS: Yes, I know it didn't take long.

Q. (By Mr. Allerdice) At the time you first saw the train, you had no concern as far as any accident was concerned, is that correct?

A. No.

Q. Why was that?

A. Well, I wasn't—I thought that she would stop, and I wasn't thinking about an accident." (R.-2, 84, 85)

Appellant Knight was taking off her overshoes and did not see the train upon approaching the crossing, as, for some distance from the crossing to the point of impact, she was not looking out of the car (R.-2, 88).

SUMMARY OF ARGUMENT

The sole question raised by this appeal is whether or not appellants produced sufficient evidence on their case in chief to raise a question of fact for the jury as

to whether or not the Railway Company breached any duty owing to appellants, and if so, whether such breach proximately caused or contributed to the accident.

It is appellee's position that it complied with all duties owing to the appellants and that the sole proximate cause of the accident was the negligence of the driver of the automobile in which appellants were riding, in conjunction with the negligence of appellant Cleff.

ARGUMENT

The statutes of the State of Washington, setting forth the standard of care to be exercised by the operators of motor vehicles approaching public railroad grade crossings, are as follows:

> "46.60.300 *Stopping at railroad crossing or movable span at signal.* Whenever any person operating a vehicle approaching any railroad grade crossing or structure with a movable span and a clearly visible electrical, mechanical or manual signal device is in operation and gives warning of the immediate approach of any train or operation of movable span, the operator of such vehicle shall stop within fifty feet, unless vehicles ahead require a greater distance, but not less than twenty feet, from such railroad or span and shall not proceed until he can do so safely. The operator of any vehicle shall stop his vehicle and remain standing and not traverse any railroad grade crossing or structure when crossing gate is lowered or when a human flagman or mechanical or electrical signal gives or continues to give a signal of the approach or passage of any train or movement of the span [1961 c. 12 § 46.60.300. Prior: 1937 c. 189 § 102 RRS § 6360-102.]"

"46.60.320 *Stopping or reducing speed at other grade crossings.* . . . Any person operating a vehicle, . . . shall, upon approaching the intersection of any public highway with a railroad or interurban grade crossing, reduce the speed of his vehicle to a rate of speed not to exceed that at which, considering the view along the track in both directions, the vehicle can be brought to a complete stop not less than ten feet from the nearest track in the event of an approaching train. . . . "

In addition to the above statutes, the standard of care and the duty of the operator of a motor vehicle approaching a grade crossing are promulgated as follows in the case of *Haaga v. Saginaw Logging Company,* 169 Wash. 547, 549, 14 P.(2d) 55:

"We have repeatedly stated that the general rule regarding the standard of care to be exercised by those traveling upon a highway is that they must exercise a reasonable care under the existing circumstances. We have, in many of our decisions, given judicial expression to what is commonly and currently accepted as a well-known fact, *i.e.,* that a railroad crossing is a proclamation of danger, and that those who propose to enter its zone must govern themselves accordingly.

"Recognizing this principle, we have added to the usual rule of 'reasonable care under the circumstances,' the specific requirement that the traveler approaching a railroad crossing must look and listen. Accompanying this statement of the rule is the added requirement that the observation must be made at a point or from a position where it would be effective. [Citing cases.]"

Where any condition exists which tends to obscure the vision of the operator of a vehicle knowingly ap-

proaching a railroad grade crossing, the law imposes an increased duty on the part of the operator. The case of *Morris v. Chicago, M. St. P. & P. R. Co.,* 1 Wn.(2d) 587, 597-8, 97 P.(2d) 119, adheres to the general rule placing this greater degree of care upon one approaching a crossing. The degree of care required is in proportion to the conditions prevailing which limit the determination and observation of danger from approaching trains. The cited case involved the death of the driver of a truck at a railroad grade crossing. There was evidence to the effect that the reason the truck driver failed to see the approaching train was that the load of hay on the track restricted his vision in the direction of the train. The plaintiff contended that because the hay on the truck was a lawful load, even though it obstructed all view to the rear, deceased was not negligent in not seeing the train, and although the court stated that the deceased's view was obstructed because of a condition for which he, himself, was responsible, the rule set out would be applicable to the factual situation in question here. The court states:

> "In *McFadden v. Northern Pac. R. Co.,* 157 Wash. 437, 289 Pac. 1, the deceased was killed when he collided with a train which was crossing a street. The accident occurred at night, and it was foggy at the time. In the cited case, the court quoted from the case of *Keene v. Pacific Northwest Traction Co.,* 153 Wash. 310, 279 Pac. 756, as follows:
>
> " ' "There was, it is true, a fog, at the time, which more or less obscured his [the injured person's] vision, but this, instead of excusing him from exercising care and caution, rather added to his duty in that respect. If he could not see whether

or not he was entering a zone of danger in venturing onto the railway track, it was his duty to take some other means of ascertaining the fact. He could not abandon all caution, take a chance on escaping injury, and, failing to escape, charge his delinquency to another.'' '

''See *Dumbolton v. Oregon-Washington R. & N. Co.,* 186 Wash. 433, 58 P.(2d) 806.

''The above cited cases bear out the general rule that, where any condition is present which tends to obscure the view of one approaching a railroad crossing, a greater degree of care, proportionate to the conditions prevailing, is required of such one in determining and observing the danger of approaching trains.''

It is held in the State of Washington that a railroad grade crossing is, in and of itself, a proclamation of danger. This rule is promulgated in the case of *Haaga v. Saginaw Logging Company,* 169 Wash. 547, 549, 14 P.(2d) 55:

''We have, in many of our decisions, given judicial expression to what is commonly and currently accepted as a well-known fact, *i.e., that a railroad crossing is a proclamation of danger, and those who propose to enter its zone must govern themselves accordingly.''* (Emphasis supplied)

The Railway Company, at a railway grade crossing such as we are concerned with herein, has the right of way over vehicular traffic approaching said crossing. As pointed out in the case of *Morris v. Chicago, M., St. P. & P. R. Co.,* 1 Wn.(2d) 587, 595, 97 P.(2d) 119:

''One who approaches a railway crossing on a public highway is as much under the duty of keeping a lookout as is the railway company; *and with*

> *knowledge that the railway company has the right of way,* and cannot instantly stop its trains to avoid accidents, it becomes his duty to use every means which a reasonably prudent person would use, under the existing circumstances, to avoid a collision." (Emphasis supplied)

It has further been held, and is the law of the State of Washington, that the right of way of the Railway Company is not conditioned upon the giving of signals. The court treated this issue in *Haaga v. Saginaw Logging Company,* 169 Wash. 547, 554, 14 P.(2d) 55:

> "The right of way of the appellants [Railway Company] was an unequivocal one, *and was not conditioned upon their first giving a warning signal.* It was a right that the appellants had under the law, and not one to be acquired by them upon the performance of preliminary conditions. *Sadler v. Northern Pacific R. Co., supra* [118 Wash. 121, 203 Pac. 10]; *Mouso v. Bellingham & Northern R. Co., supra* [106 Wash. 299, 179 Pac. 848]." (Emphasis supplied)

The general rule regarding the duty of the Railway Company in making a train movement such as was made in the case at issue is found in the case of *Porter v. Chicago M. St. P. & P. R. Co.,* 41 Wn.(2d) 836, 843, 252 P.(2d) 306:

> "The courts and textwriters are in substantial accord that when a train of cars enters a street to cross it, vehicle traffic must yield to it the right of way. While occupying the crossing, the train gives actual notice of its presence, and this supersedes all other warning. If upon entering into a street a brakeman takes appropriate measures to warn traffic thereon, the railroad company discharges

its duty of care towards them. These rules, however, cannot be given full application if unusual circumstances or conditions exist making the crossing so peculiarly dangerous that prudent persons cannot use the same with safety unless extraordinary measures are used."

It is noted that the *Porter* case sets out an exception to the rule in a case where unusual circumstances or conditions exist, making a crossing so peculiarly dangerous that prudent persons cannot use the same with safety unless extraordinary measures are used. In this regard, our court has held that knowledge of the hazard, if any, on the part of the plaintiff, puts a higher degree of care upon that party. In the case of *Carroll v. Union Pacific Railroad Co.,* 20 Wn.(2d) 191, 146 P.(2d) 813, the lower court granted a motion for nonsuit, which motion was affirmed on appeal. In the *Carroll* case, the plaintiff had an accident with a train while driving an automobile over a grade crossing where visibility was restricted for the plaintiff because of a hill and growth of grass. However, plaintiff was familiar with this fact. The court states at page 195:

"The close proximity of the bank to the track was a hazard with which appellant was thoroughly familiar from his many years' use of the crossing. The fact that the hazard was increased by grass and weeds growing upon the right of way and upon the bank was also open and obvious. It does not appear that appellant ever sought to lessen this hazard by cutting the grass or weeds, or that he requested respondent to do so. He accepted the dangerous situation as he found it, and crossed the track from south to north frequently, often as many as six times in a day."

And the court states further, at page 197:

> "If he [plaintiff] could not see whether or not he was entering a zone of danger in venturing onto the railway track, it was his duty to take some other means of ascertaining the fact. He could not abandon all caution, take a chance on escaping injury, and, failing to escape, charge his delinquency to another." (Citing *Keene v. Pacific Northwest Traction Co.,* 153 Wash. 310, 279 Pac. 756)

The court has defined an extrahazardous crossing in *Bradshaw v. Seattle,* 43 Wn.(2d) 766, 264 P.(2d) 265, as follows:

> "A crossing is extrahazardous where unusual circumstances or conditions exist which make it so peculiarly dangerous that prudent persons cannot use it with safety unless extraordinary measures are used."

The court has also said that a given crossing may be found to be not extrahazardous as a matter of law. This matter was discussed in the case of *Hopp v. Northern Pacific R. Co.,* 20 Wn.(2d) 439, 147 P.(2d) 950, in which case the court held as follows in determining that the crossing therein was not extrahazardous as a matter of law:

> "The respondent alleged that the crossing was extrahazardous and that the appellants were negligent in failing to keep a watchman or automatic signal alarm bell at the crossing. The deceased was familiar with the crossing and had a clear and unobstructed view of the track, in the direction from which the gas motor coach was approaching, of from 1,000 to 2,800 feet when he was at a distance of one hundred feet from the crossing. In *Mis-*

souri K. & T. R. Co. v. Long, 299 S.W. 854, the court held that a crossing is more than ordinarily dangerous if it is so peculiarly dangerous that prudent persons cannot use the same with safety unless extraordinary means are used to approach such place. The crossing was not an extrahazardous one, as a matter of law, under the facts of this case. Hence, this allegation of negligence must fail."

Appellants argue that a factual question was made out for the jury because the crossing in question was an extrahazardous one. All railroad crossings in the State of Washington are, as a matter of law, dangerous, and the State has promulgated by way of statute and rules the duty of the Railway Company in taking steps to warn approaching motorists of the presence of the train. The courts in this State have found that, at times, because of the existence of certain conditions, a motorist using reasonable care might not be made aware of the existence of the approaching train even though the Railway Company complies with the statute and rules that are sufficient at crossings where said unusual conditions do not exist. When conditions exist which limit or obstruct the view of approaching motorists—for example, atmospheric conditions, physical obstructions such as buildings or brush or the contour of the roadway approaching the crossing—which conditions create an extra hazard to approaching motorists, there may be created a question of fact for the jury as to whether or not the sounding of an audible signal and/or the presence of the train itself is sufficient warning to approaching motorists. Regardless of how dangerous a particular crossing may be, and even if it is found to be extrahazardous, the Railway Company has

a burden of care to safeguard users of the highway by making provision for adequate warning to them when its train movements are going to enter upon the highway. In the instant case, the Railway Company provided an electric red traffic signal, which it is agreed was actuated prior to the entry of the train upon the traveled portion of the street, and was giving a warning up until the time the collision occurred; a flagman preceded the train movement across the street and had stopped traffic in three of the four lanes thereof; and, in addition, the logs on the train were piled to a height of 25 feet above street level, making the train movement clearly visible to anyone looking in that direction. It is appellee's position that the crossing is not extrahazardous, but even though it be determined that a question of fact was made as to the crossing in question being extrahazardous, it should be held as a matter of law, as it was in the case of *Watson v. Northern Pacific Ry. Co.,* 37 Wn.(2d) 374, 223 P.(2d) 1057, that the measures appellee took to warn approaching motorists of the presence of the train were sufficient. The *Watson* case involved a collision between an automobile and a Railway Company engine. Prior to the accident, the engine had been stopped behind a building, which hid it from southbound traffic. It became necessary for the engine to cross the street, so a flagman took his position in the street and a back-up signal was given. As the accident occurred at night, the engine's back-up light was turned on. Two blasts of the horn were given, and the engine bell commenced ringing. The engine backed out into the street at approximately 5 miles per hour. The flagman, meanwhile, was swinging a lantern

which was visible from either direction, although he was facing south. Northbound cars slowed down and came to a stop. The flagman then noticed the car in which plaintiff was riding approaching from the north. He turned to face the oncoming car. *He was then off the highway on its east margin.* The car continued on its course until it struck the leading end of the engine. A trial to a jury resulted in a verdict for plaintiff. However, defendant's motion for judgment n.o.v. was granted on the ground that there was no evidence of negligence on the part of defendant, and that the negligence of the driver of the car was the sole proximate cause of the injury. The plaintiff appealed, and the Supreme Court, in affirming the lower court's granting of the motion for judgment n.o.v., stated as follows (page 375):

> "We are concerned, therefore, solely with the question of whether or not the respondent was guilty of any negligence which was a proximate cause of the injury. This was a dangerous crossing, and that fact imposed upon the respondent a burden of care to safeguard users of the highway against injury by making provision for adequate warning when its engine crossed the highway. The measures it took to do this were sufficient, as a matter of law.
>
> "Assuming that this crossing was extrahazardous, it still did not constitute a trap within the purview of the cases cited by appellant upon that theory.
>
> "[2, 3] When the respondent, by its flagman, took appropriate measures to warn travelers on the highway, it discharged its duty of care toward them. *Tonning v. Northern Pac. R. Co.,* 180 Wash.

374, 39 P.(2d) 1002. We are concerned, in such cases, with the adequacy of the warning given, not with whether a traveler on the highway was aware of the warning. He ought to be aware of an adequate warning. We have repeatedly said that one cannot be heard to say that he did not see that which, without dispute in the evidence, was there to be seen had he looked. *Silverstein v. Adams,* 134 Wash. 430, 235 Pac. 784.

"The trial court was correct in granting a judgment n.o.v."

The case of *Morris v. Chicago, M., St. P. & P. R. Co.,* 1 Wn.(2d) 587, 97 P.(2d) 119, is authority for the right of the trial court to determine that a person is guilty of contributory negligence as a matter of law. Regarding this right, the court, in the *Morris* case, reaffirms the following holding from the case of *McQuillan v. Seattle,* 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799:

" 'There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law. . . . The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances. . . . And the second is where the facts are undisputed and but one reasonable inference can be drawn from them. . . . If different results might be honestly reached by different minds then negligence is not a question of law, but one of fact for the jury.' "

The case of *Hendrickson v. Union Pacific R. Co.,* 17 Wn.(2d) 548, 559, 560, 136 P.(2d) 438, sets forth the conditions in a crossing accident when the court is jus-

tified in making a finding of negligence as a matter of law. The court in this regard stated as follows:

> "Here, again, the impression might have been conveyed that this is a rule of universal application and admits of no exception, and that, when one collides with a moving or standing train on a crossing, he is guilty of negligence as a matter of law. *In the ordinary case, and particularly where the visibility is good, there can be no question about this, and reasonable minds cannot differ.* In those cases where the visibility is poor the measure of care on the part of the user of the highway greatly increases, but we may have situations where reasonable minds might differ as to whether the user of the highway exercised the proper amount of care under the circumstances, and, in such case, the question becomes one for the jury." (Emphasis supplied)

That the driver of the vehicle in which appellants were riding was negligent upon her approach to the crossing cannot be denied. That this negligence was a proximate cause of the collision cannot be denied, and considering the existing circumstances and precautions taken by appellee, appellee submits that the negligence of the driver of the vehicle in which appellants were riding was, in fact, as a matter of law, the sole proximate cause of the collision in question.

Appellants also argue that a factual question was made for the jury on the basis of the trap doctrine under Washington law. Under the facts presented by the evidence herein, appellee cannot visualize what circumstances existed at the time and place to create a trap, other than the conduct of Mrs. Warren, which is not chargeable to appellee. The evidence is undis-

puted that the sun did not interfere with Mrs. Warren's vision, insofar as the presence of the train movement was concerned. The evidence is further undisputed that appellant Cleff, riding in the back seat of the Warren vehicle, saw the train when the Warren vehicle was 100 feet from the crossing, at which time the leading end of the train had entered upon the traveled portion of 11th Street. Mrs. Warren testified that, had she looked in the direction of the train, there was nothing to obstruct her view thereof. Regardless of the other precautions taken by appellee, by these facts alone appellee discharged its duty of warning, insofar as the Warren vehicle was concerned. Appellee submits that, if a train movement is clearly visible to an approaching motorist when the motorist is 100 feet from the crossing (the existence and location of which crossing she was at the time familiar with (R.-2, 27, 28)), at which time the motorist is traveling at a speed of 12 to 15 miles per hour, and said motorist testifies that because of her slow speed there was plenty of time to look for a train, and she was, in fact, looking for a train, as is evidenced by her testimony as follows:

> "Q. Well, all right; then as you approached this crossing, your testimony is that you at no time looked for a train?
>
> A. Oh, yes. I had plenty of time to look for the train because I was going slow.
>
> Q. Were you looking for a train?
>
> A. I really was, and I looked more for the flagmen because they are always out there.
>
> Q. But you were also—now testimony is—looking for a train?

A. Well, I was looking for a train and the flagman both. When you are driving, you kind of keep your mind on a little bit of everything.

Q. Well, I don't want to belabor this point too much, but so the jury gets it straight and we all get it straight, as you approached this crossing at some point or other before the impact, you did look for a train?

A. I really looked for the flagman.

THE COURT: No, he wants you to answer the question, Mrs. Warren. We will be here so long if you don't answer. Please answer the question. Did you look for a train?

THE WITNESS: Sure I did.

THE COURT: All right." (R.-2, 40, 41)

then it cannot be determined that the crossing is extrahazardous or in the nature of a trap as to that motorist.

CONCLUSION

In conclusion, appellee calls attention to the trial court's oral decision upon granting appellee's motion to dismiss appellants' complaints, where the court stated as follows:

"I am confident a verdict for plaintiffs on this evidence would not stand. This is a diversity case. We are dealing strictly and solely with the applicable common law of Washington with respect to negligence principles, and it is a basic principle of Washington law of negligence that substantial evidence is required, and a mere scintilla is not sufficient. If the plaintiffs' case rests solely on a scintilla of evidence, either as to negligence, proximate

cause, or damages, any one of the three, there is insufficient evidence for submission to the jury.

"In my opinion, plaintiffs' proof at the very most amounts to only a scintilla of evidence, and that is not sufficient. The evidence shows no negligence on the part of the defendant railway, but even if it be assumed otherwise, there is no evidence whatever, except the wildest speculation, to establish proximate causal relationship of the assumed negligence to the collision in question." (R.-2, 107, 108)

Appellee respectfully submits that the judgments entered herein should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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ROBERT J. ALLERDICE
Attorney